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Copyright Office

37 CFR Parts 201 and 203

[Docket No. 2012-1]

Copyright Office Fees

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office has further revised its proposed fee schedule for filing cable and satellite statements of account following feedback from interested parties in response to a Notice of Proposed Rulemaking published on March 28, 2012. The modified fee schedule set forth below reflects an updated calculation of the cost of providing services.

DATES: Comments must be received in the Copyright Office no later than 5 pm Eastern Standard Time (EST) on [insert date 30 days from date of publication in the **Federal Register**]. Reply comments must be received in the Copyright Office no later than 5 pm Eastern Standard Time (EST) on [insert date 45 days from date of publication in the **Federal Register**].

ADDRESSES: Comments should be submitted electronically. A comment page containing a comment form is posted on the Copyright Office website at <http://www.copyright.gov/docs/newfees/comments/>. The website interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browse button. To meet accessibility standards, all comments must be uploaded in a single file not to exceed six megabytes (MB) in one of the following formats: the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and

the organization. All comments will be posted publicly on the Copyright Office website exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Copyright Office at (202) 707-8380 for special instructions.

FOR FURTHER INFORMATION CONTACT: Megan Rivet, Budget Analyst, or Melissa Dadant, Senior Advisor for Operations and Special Projects, at (202) 707-8350.

SUPPLEMENTARY INFORMATION:

In 2010, Congress enacted the Satellite Television Extension and Localism Act (“STELA”), Public Law 111–175, 124 Stat. 1218, which, for the first time, granted authority to the Copyright Office to establish fees for the filing of statements of account (“SOAs”) pursuant to the section 111, 119, and 122 statutory licenses for cable and satellite users. Prior to 2010, the cost of processing such statements and associated royalty payments was funded solely by the royalty fees collected for the benefit of the copyright owners under the statutory licenses.

STELA added a new provision to Title 17 that permits the Office to apportion up to 50 percent of the cost of processing the SOAs and royalty payments to licensees. More specifically, 17 U.S.C. 708(a) provides that the fees charged to licensees for the filing of SOAs “shall be reasonable and may not exceed one-half of the cost necessary to cover reasonable expenses incurred by the Copyright Office for the collection and administration of the statements of account and any royalty fees deposited with such statements.”

On March 28, 2012, the Copyright Office published a Notice of Proposed Rulemaking (“NPR”) as the initial step in adopting new fees for various services, including the registration of claims, recordation of documents, special services, processing of requests for records pursuant to the Freedom of Information Act, and Licensing Division services, including the new fees for filing of cable and satellite SOAs. *See* 77 FR 18742 (March 28, 2012). Fees were proposed in accordance with the procedure set forth in the Copyright Act, which provides that the Register of

Copyrights may, by regulation, adjust fees for certain enumerated services based upon a study of costs incurred by the Copyright Office. *See* 17 U.S.C. 708(b).

Generally speaking, the Office has conducted a study of costs every three years. In each case, and in the case here, the Office is acutely aware of its obligations as an agency of the federal government, including the mandate to establish sound fiscal policies and develop a responsible budget. At the same time, the Office is cognizant of its responsibilities to both copyright owners and users of copyrighted works. Ultimately, the Office must price its services in a manner that is fair to the parties and conducive to well-functioning programs and recordkeeping. Indeed, elsewhere the Copyright Act indicates that fees “shall be fair and equitable and give due consideration to the objectives of the copyright system.” 17 U.S.C. 708(b)(4).

In response to the NPR, the Office received 138 comments on the proposed fees, three of which specifically addressed the new fees for filing cable and satellite SOAs. The Office received individual comments from the American Cable Association (“ACA”) and the National Cable & Telecommunications Association (“NCTA”), and a joint comment from Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Music Claimants, Canadian Claimants Group, National Public Radio, Broadcaster Claimants Group, and Devotional Claimants (collectively, “Copyright Owners”).

NCTA expressed the concern that the proposed fees sought to recover costs for services “that go beyond what is reasonably necessary to administer the license and reflect[] expenses incurred in the past that are unlikely to recur in the future.” NCTA Comments at 2. ACA requested the Office to provide a waiver of fees for cable operators experiencing financial hardship. *See generally* ACA Comments.

Copyright Owners, on the other hand, argued that the proposed fees failed to recover half of the actual operating costs of the cable and satellite program, and also questioned the Office's methodology, specifically why actual costs were not the starting point for analysis. *See generally* Copyright Owners' Comments.

In light of the comments received from affected stakeholders, and because the fees for filing cable and satellite SOAs are being set for the first time, the Office conducted further analysis of those fees. As explained below, it performed a second study, using a revised methodology to more precisely capture the cost of providing the services in question.

New Cost Study for Setting Cable and Satellite SOA Filing Fees

The original cost study for the Office's administration of the cable and satellite statutory licenses used the additive model employed in previous cost studies for peripheral fee services. This method focuses on the desk time of dedicated employees, in other words, how much time they spend performing activities involved in processing a typical service request. While effective in analyzing services that can be measured by short intervals of time, it is sometimes not as successful in determining the cost of a more complex task, such as the processing of an entire SOA. At the same time, managing the cable and satellite SOAs is a major program of the Office and comprises the greatest portion of staff time and related resources in comparison to administering the other statutory licenses.

In its reexamination of SOA program costs, the Office applied a traditional methodology that it has used to assess the costs of its services in other areas, such as copyright registration. This methodology calculates the full cost of the activity in question – in this case, the entire SOA program, including the receipt and administration of the SOAs and royalty fees deposited with such statements – based on actual expenditures and all costs directly or indirectly associated with these functions. The revised methodology identifies staffing costs for each particular program

service and apportions non-personnel costs either directly to the services they support or, in the case of administrative and other indirect costs, in proportion to the staff costs previously identified. Staffing costs not associated directly or indirectly with any of the program services, along with a commensurate proportion of non-personnel costs, are excluded from the model.

The revised methodology is more complete because it accounts for all relevant staff time, whether associated directly with a program service or indirectly, and includes all staff, including administrative and managerial staff, and all relevant non-personnel costs. Because it is all-inclusive, it covers costs incurred where the standard workflow path cannot be followed, as well as exceptional cases that involve time-intensive research or problem resolution, for example, cases where electronic funds transfer payments need to be matched with a SOA received much earlier or later than the payment or without a remittance advice. It also covers non-routine staff effort. For instance, during the period under review, the Office revised work procedures and forms, and updated its internal information systems, to facilitate its implementation of STELA. The Office expects these types of administrative and technical upgrades to continue to occur during the life of the SOA program.

In conducting the second cost study, the Office applied a three-year average of non-personnel costs to address concerns that an aberrant year may have an undue impact on the proposed fees. The Office considered reengineering efforts of the Licensing Division in the area of statutory licenses and the rise of associated costs in 2011. The administrative and technical enhancements are integral to the SOA program. However, in order to mitigate the impact of higher than usual costs in 2011, the 2011 costs have been averaged with costs from 2010 and 2009 to achieve a balanced representation of the overall, ongoing cost of the SOA program, including periodic and technical upgrades.

Finally, in both the initial and revised cost studies, the Office excluded approximately 75 percent of salaries for staff who work in the Fiscal Section of the Licensing Division. The Office did so because much of the work of these employees is dedicated to royalty management functions that serve copyright owners (e.g., production of financial statements, reconciliations, investments, and distributions); the 75 percent exclusion is meant to fairly account for this fact.

Revised Fees for Cable and Satellite Statements of Account

In the initial cost study, the Office analyzed the processing of cable SA1, SA2, and SA3 SOAs and satellite SOAs independently. In performing the revised study, it was evident that many of the program costs are common to both cable and satellite filings, in particular the fiscal management and information technology costs, and thus should be shared by both types of filers.

Based on its further evaluation of the program costs for the collection and administration of the cable and satellite SOAs and the royalty fees deposited with such statements, the Office continues to propose a tiered fee schedule corresponding to the filing of the different types of SOAs. The fees for licensees who file a cable SA1 or SA2 form remain unchanged from the initial proposal, \$15 for the filing of a SA1 form and \$20 for the filing of a SA2 form. Such fees are reasonable in light of the minimal amount of processing required and the typical royalty payments associated with such statements, which are substantially lower than royalties associated with SA3 filings. *See* 17 U.S.C. 708(b) (fees established by the Register for cable and satellite SOAs are to be “reasonable”). Additionally, following its review of the totality of SOA program costs, as described above, the Office proposes to establish both the cable SA3 filing fee and satellite filing fee at \$725. The Office believes that \$725 is a reasonable fee in light of the second cost study and substantial royalty payments associated with these SOAs.

Moreover, at the proposed levels, the fees collected from licensees filing SOAs should in the aggregate approach, but not exceed, 50 percent of the Office's reasonable expenses to administer the cable and satellite SOA program, as determined in the more recent study conducted by the Office. Based on projected filings, the expected annual fee recovery will be approximately \$1.77 million, or approximately 47 percent of the estimated \$3.74 million total annual SOA program cost.

Schedule of Revised Proposed Fees

The chart below sets forth the proposed fees for filing cable and satellite SOAs:

SCHEDULE OF PROPOSED FEES Administration of Statutory Licenses		
		Proposed New Fee
(1)	Processing of a statement of account based on secondary transmissions of primary transmissions pursuant to §111:	
	(i) Form SA1	\$15
	(ii) Form SA2	\$20
	(iii) Form SA3	\$725
(2)	Processing of a statement of account based on secondary transmissions pursuant to §§ 119 and 122	\$725

The Office believes that, as revised, the proposed fees are appropriate based on the reasonable expenses incurred in the processing of cable and satellite SOAs and managing the associated royalty payments. Moreover, the fees are set to approach one-half the costs, without exceeding one-half, in order that owners and users of copyrighted works share the burden of supporting the cable and satellite SOA program. An outcome where program costs are shared relatively equally by owners and users is consistent with the mandate of STELA, as well as the objectives of the copyright system.

Waiver of Filing Fees

ACA suggests that the Office “establish a streamlined waiver process for smaller cable operators where payment of the filing fee would result in a financial hardship.” ACA Comments at 2. While the Office understands ACA’s rationale for this request, the law appears to preclude this option.

Section 708(a) requires that “fees shall be paid to the Register of Copyrights” for filing a cable SOA. The statute also instructs the Register to fix said fees based on relevant costs. To this end, the Office conducted a cost study, taking into account that cable companies that file SA1 and SA2 forms benefit from the statutory licensing scheme, yet generate revenues considerably lower than the cable systems that file the SA3 form. Accordingly, the Office is proposing significantly lower fees to ensure that they are reasonable under the circumstances.

To the extent the suggestion of ACA is that nothing in the law expressly prevents the Register from creating exceptions or waivers to the general fee, the Office notes that Congress has set forth express authority for the Register to waive fees elsewhere in section 708. Section 708(c) grants the Register discretion to waive fees for United States agencies and their employees, but only “in occasional or isolated cases involving relatively small amounts.” Such express and limited authority in the area of waivers suggests that Congress would have created a clear exception or waiver of the kind suggested by ACA had it so desired. Moreover, no such waivers exist with respect to other fee requirements, including for example, for registrations of individual claimants. The Office welcomes further comment on whether the statute provides authority to the Register to establish a waiver process where payment of the filing fee would result in a financial hardship and whether, in general, waivers of this kind should be permissible.

Technical Amendments

The Office will adopt technical amendments as needed to conform existing regulations to the changes proposed in this notice.

Request for Comments

As noted above, the Copyright Office is publishing the revised proposed fee schedule for these particular fees to provide the public with an opportunity to comment.

Dated: November 29, 2012

Maria A. Pallante,
Register of Copyrights.

[BILLING CODE 1410-30-P]

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